1986

# Metropolitan Property and Liability Insurance Company v. Neal W. Finlayson, Lee Childs, Michelle Childs : Petition for Rehearing

Utah Supreme Court


Lowell D. Smith; Hansen, Epperson and Smith; Attorneys for Respondent.
Anthony M. Thurber; Attorney for Appellant.

IN THE COURT OF APPEALS

OF THE

STATE OF UTAH

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| METROPOLITAN PROPERTY & LIABILITY INSURANCE COMPANY,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>NEAL W. FINLAYSON, individually and LEE CHILDS, individually and as Guardian ad litem of MICHELLE CHILDS, a minor,<br><br>Defendant and Appellant. | No. 860204 - CA<br><br>Before Judges Orme, Bench and Billings |

# METROPOLITAN PETITION FOR REHEARING

Appeal from the Judgment of the

Third Judicial District Court, Salt Lake County

the Honorable David B. Dee, District Judge, Presiding

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COMES NOW Metropolitan Property & Liability Insurance Company, by and through its attorneys undersigned and, pursuant to Rule 35, Rules of the Utah Court of Appeals, moves this court for rehearing.

This Petition for Rehearing is supported by the attached memorandum of points of law and fact which petitioner claims the court has overlooked or misapprehended.

The undersigned counsel for petitioner hereby certifies that the petition is presented in good faith and not for delay.

DATED this 21st day of March, 1988.

**HANSON, EPPERSON & SMITH**

LOWELL V. SMITH
Attorneys for Metropolitan Property & Liability Insurance Company

## MEMORANDUM OF POINTS AND AUTHORITIES

The following Memorandum of Points and Authorities is submitted in support of Metropolitan Property & Liability Insurance Company's Petition for Rehearing.

## ISSUES FOR RECONSIDERATION

It is respectfully submitted that this Court of Appeals has overlooked or misapprehended a number of issues critical to the appeal in this matter. The following list will itemize some of the concerns of Metropolitan Property & Liability Insurance Company. Each issue will be discussed in greater depth in the body of the memorandum.

1. THE ISSUES PRESENTED TO THE COURT OF APPEALS FOR CONSIDERATION WERE MANY.

This Court of Appeals indicated that:

> The single issue on appeal is whether the trial court correctly determined, on the stipulated facts, that Finlayson's use of the FINCO pickup constituted "regular use" within the meaning of the exclusion contained in the policy. If it did, the pickup would not be considered a non-owned automobile for the purposes of the policy and Metropolitan would have no liability. (Opinion page 2).

The issue of whether the actual use of the pickup truck at the time of the accident was a "regular use" was one issue, but only one. Metropolitan pointed out in its brief that actual use was not required to invoke the exclusion. Rather, if the pickup truck was furnished or available for regular use, the exclusion would be invoked to exclude coverage.

There were a multitude of other issues raised by the

parties to this appeal. The issue of whether the term "regular use" was ambiguous was an issue raised in the appeal. Again, this issue was an important issue but not alone determinative of all of the issues raised, nor of the ultimate resolution of the controversy. This Court has failed to consider several important issues raised by the appeal.

2. This Court of Appeals found the term "regular use" to be ambiguous. However, A FINDING OF AMBIGUITY ALONE WOULD NOT RESOLVE THE CONTROVERSY.

This Court of Appeals stated:

> From all that has been said, we find inescapable the conclusion that the phrase "regular use" as used in the Metropolitan policy, is ambiguous. The phrase must therefore be construed in favor of coverage for Neal Finlayson and, therefore, recovery for appellant Childs.

The finding that the term "regular use" is ambiguous does not a fortiori result in a finding of coverage for Neal Finlayson. Rather, once this Court finds that the term is ambiguous, the proper procedure for this Court to follow is to then apply the definition suggested by the appellant (i.e., "pattern of use") to the exclusion of the policy and then determine whether, under the facts of the accident, the exclusion would apply. Merely finding that an ambiguity does exist does not result in an automatic extension of coverage.

3. APPLYING EVEN A "PATTERN OF USE" STANDARD IN DETERMINING THE DEFINITION OF "REGULAR USE" ESTABLISHES THAT NO COVERAGE WOULD BE AFFORDED BY THE METROPOLITAN POLICY.

The policy of insurance, as discussed in the briefs filed with this Court, provides that there is no coverage for a non-owned vehicle which is "furnished or available for the regular use of either the named insured or any relative." Applying this Court's adopted definition of "pattern of use" to the term "regular use" it is clear that the pickup truck was "furnished for or available for" the "pattern or prescribed course of use" which would exclude coverage.

4. THE POLICY ITSELF INCORPORATES A "FREQUENCY" TEST, RATHER THAN A "PATTERN OF USE" TEST. Further, the policy focuses on the vehicle, not the driver.

The exclusion under consideration by this Court of Appeals distinguishes between a "temporary substitute automobile" and an automobile furnished or available for the regular use of the insured.

5. THE PUBLIC POLICY BEHIND THE EXCLUSION IS NOT FOSTERED BY THE ADOPTION OF A "PATTERN OF USE" TEST.

Metropolitan indicated to this Court that the purpose behind the "drive other cars" exclusion is to encourage (in this case) an employer to supply sufficient liability insurance on a company truck being operated by an employee to protect the public and his employees. Further, if an individual desires to have additional, private protection for his operation of the vehicle, he need only list the vehicle on his individual policy and pay a

premium for such coverage. The Court's opinion would, in effect, send a signal to employers that they need not have sufficient insurance (since the individual's private policy will supply additional insurance coverage) and sends a signal to the individual that he need not pay for insurance coverage on vehicles he frequently uses but does not own.

6. THIS COURT FAILED TO CONSIDER THE EXCLUSION, RAISED BY METROPOLITAN IN ITS BRIEF AND IN ORAL ARGUMENT, WHICH EXCLUDED A "BUSINESS USE" EXCLUSION.

The Metropolitan policy excluded coverage (in addition to the "regular use" exclusion) to vehicles:

> . . . while maintained or used by any person while such person is employed or otherwise engaged in any other business or occupation. . .
>
> .

This Court of Appeals did not discuss the fact that Mr. Finlayson's use of the truck to take him to and from work each day was considered by his employer to be part of his business use of the truck and was part of the normal operation of the truck. Further, this Court did not discuss the fact that the employer's business automobile insurance policy has already acknowledged the injuries sustained were a business-related accident, and has paid a substantial amount of money for the damages arising from this accident.

## DISCUSSION

POINT I: THE ISSUES PRESENTED TO THIS COURT OF APPEALS WERE MANY.

The issues presented to this Court of Appeals were many and were complex. The Court, in addressing the issues before it, stated:

> The single issue on appeal is whether the trial court correctly determined, on the stipulated facts, that Finalyson's use of the FINCO pickup constituted "regular use" within the meaning of the policy. If it did, the pickup would not be considered a "non-owned automobile" for the purposes of the policy and Metropolitan would have no liability. (Opinion p. 2).

The issue of the use of the pickup truck by Neal Finlayson was an important issue to this appeal, but was only one issue. As Metropolitan pointed out in its brief and at oral argument, the policy excluded coverage to vehicles which were owned by the insured (but not scheduled on the policy), and to non-owned vehicles which were furnished or available for the regular use of the insured, Mr. Finlayson.

The Court did consider the fact that the

> truck was furnished to Neal Finlayson for use in the course of his employment, i.e., answering calls for and performing mechanical repairs, his use of the truck to go to and from the "Animal House" bar was outside that course, especially in view of the limitations expressly put on his use of the truck by FINCO." (Opinion at p. 3).

However, the Court did not consider nor address the fact that the truck was available for such use. The Court's attention was focused on the actual use to which the vehicle had been put;

not to the potential use for which the employer had made the truck available.

This distinction is important. As a practical matter using appellant's suggested definition of "regular use," any use of a non-owned vehicle may be deemed to be "irregular" when an accident occurs. The "pattern of use" did not establish that accidents would regularly occur, that vehicles would be used by individuals had been drinking, that, etc. However, the policy doesn't require only that there be a deviation of actual use in order to establish an "irregular" use. Rather, the policy only requires that the vehicle be <u>available</u> for regular use. It may be that a particular vehicle will have never been "regularly used." However, if the potential for regular use exists (i.e., it is "available" for regular use), the insured must pay a premium for coverage or the coverage will be excluded.

Further, the use to which the truck was being put at the time of the accident was the same as it had been used on numerous other occasions; i.e., taking Mr. Finlayson home. Mr. Finlayson's capacity may have been diminished because of his consumption of alcohol, but the use of the truck remained unaltered. The policy exclusion for uses on the potential use of the truck, not the "state" of the operator.

There were a number of other issues, raised by the parties to the appeal, which were not considered by this Court. The Court did not address whether Mr. Finlayson's use of the

pickup truck was a "business use" as excluded in the policy.

The Court did not address what the effect should be, given its finding of an ambiguity in the meaning of the term "regular use" as applied against the language of the policy.

The Court did not address the public policy supporting the "drive other cars" exclusion.

The Court did not address the fact that Mr. Finlayson's business automobile policy had already acknowledged the accident to be one covered by its insurance policy.

The Court did not address the internal language of the exclusion which supports Metropolitan's contention of no ambiguity.

The point is, there are a number of other issues beyond simply the issue of whether "Finlayson's use of the FINCO pickup constituted 'regular use' within the meaning of the policy." This Court should grant the Petition for Rehearing so that each of the issues raised can be adequately considered by this Court.

POINT II: FINDING OF AN AMBIGUITY DOES NOT RESULT, A FORTIORI, IN COVERAGE.

This Court found that, since the term "regular use" is ambiguous (because various courts from other jurisdictions have reached different interpretations of the term) "the phrase must, therefore, be construed in favor of coverage for Neal Finlayson and, therefore, recovery for appellant Childs." The Court's holding is not supported by the premise.

This Court, citing Sears v. Riemersma, Utah 655 P.2d 1105 (1982) stated that an ambiguity resulting from a failure to define a term in a contract should "trigger the doctrine that ambiguous language in a contract will be strictly construed against the party who drafted the provision. (Opinion p. 5). With this general proposition, Metropolitan does not disagree. However, the mere finding of an ambiguity does not operate in a dispositive fashion simply because ambiguity has been found.

This Court has cited its own opinion Wilburn v. Interstate Electric, C.A. Utah, 74 Utah Adv.Rep 23 (1988) as standing for the proposition that:

> Ordinarily, it is appropriate to simply construe ambiguities against insurers, without pausing to consider extrinsic evidence as to intent, since the parties to routine kinds of insurance contracts typically do not discuss or negotiate terms[1] and provisions. (Opinion, p. 3, footnote 3).

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[1]It should be pointed out that insurance contract forms are not unilaterally drafted by insurance companies and imposed upon an unsuspecting public. Under current law, the insurance industry is substantially regulated as to the kinds of insurance which may be written, the specific provisions which may be contained in insurance policies, specific provisions which may not be contained in insurance policies, etc. Utah Code Annotated Section 31A-21-201, et seq., provides that insurance policies must be filed with the Commissioner of Insurance who may disapprove a form for a number of reasons. Specific requirements for the content and language of insurance policy are also set forth in detail in many of the Sections of the Insurance Code. See, for example, Section 31A-21-301, et seq. and Chapter 22, Contracts in Specific Lines. The definition of a non-owned vehicle is a definition typically used in insurance policies, the form of which has been filed with the insurance department.

Even in cases involving insurance policies, it is not dispositive to merely find an ambiguity in an insurance contract. Even though extrinsic evidence may not be helpful in resolving questions of "intent and meaning" since no "negotiation nor discussion may have taken place," further inquiry is still required to determine what effect a particular definition may have on the extent of the exclusion.

Here, for example, the validity of the exclusion was not questioned. Rather, appellant's attack was focused on the alleged ambiguity of the exclusion. Appellant contended that the term "regular use" must be interpreted to show a "pattern of use" consistent with a prescribed course of conduct or dealing to which the truck had been put in the past.

Assuming that an ambiguity exists, which the Court found, the Court should then determine what effect the exclusion would have when applying the definition of "regular use" as proposed by appellant. Merely finding that an ambiguity exists does not result in dispositive fashion to resolve the matter against an insurer.

POINT III: APPLYING A "PATTERN OF USAGE" MEANING TO THE TERM "REGULAR USE" DOES NOT ESTABLISH COVERAGE.

As Metropolitan pointed out in its brief and at hearing, the Metropolitan policy states:

> non-owned automobile" means an automobile which is neither owned by nor furnished nor available for the regular use of either the named insured or any relative, other than a temporary substitute automobile and includes a utility trailer while used with such automobile.

Since the Court found that the term "regular use" is ambiguous, it should apply the meaning proposed by appellant to the term and then analyze the exclusion in light of the then established meaning. Therefore, the exclusion as defined by appellant, would read:

> "Non-owned automobile" means an automobile which is neither owned by nor furnished nor available for the "pattern or prescribed course of conduct" (i.e., employment use, answering calls for and performing mechanical repairs; see Opinion p. 3) of the named insured . . .

The exclusion does not pertain to a <u>particular use</u> at a <u>particular time</u>. Rather, the truck cannot be "furnished for" <u>or</u> "available for" the "employment use, general course of conduct or dealing," for which the truck had been used or available. If it is, furnished or available for such use, coverage is excluded.

The issue, using the court's adopted definition becomes, was the truck furnished for the employment use; i.e., "answering calls for and performing mechanical repairs" (Opinion p. 3) as the regular use of the truck? This Court found (by adopting appellant's proposed definition) that it was. Was the use of the truck after having left the Animal House contrary to this use?

Again, the Court apparently found that it was.[2] (Opinion, p. 3). However, was the pickup furnished for or available for the "regular use" of Mr. Finlayson. Certainly, since the standard which the Court adopted for the definition of the term "regular use" was the use to which the truck was typically used, the truck was available for regular use.

The particular use at a particular time may not have constituted "regular use" (using appellant's and this Court's definition) but the pickup truck was obviously furnished for or available for such use.

This approach is consistent with the cases cited by the Court in reaching its decision. In Central Sec. Mut. Ins. Co. v.DePinto, Kansas 681 P.2d 15 (1984), as cited by the Court, the Kansas Supreme Court said:

> The test whether an automobile is furnished for "regular use" within an exclusionary clause is not necessarily the frequency or regularity of its, although an infrequent and casual use by special permission on particular occasions may not constitute a furnishing for regular use. It is the nature of the use for which the vehicle is intended and to which it is put, rather than the actual duration of use, which is significant. (Emphasis Added).

Applying appellant's and the Court's definition of "regular use" and applying such definition to the facts of this

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[2]Again, the use of the pickup truck at the time of the accident was the same use to which the truck had been put on a number of occasions; taking Mr. Finlayson home. His capacity to perform the function was impaired, but the use was the same.

accident, the exclusion would still exclude coverage for the accident.

POINT IV: THE POLICY ITSELF ESTABLISHES A FREQUENCY TEST.

The "regular use" exclusion which is the subject of this appeal establishes a "frequency test." As mentioned above, the exclusion distinguishes between a "temporary substitute automobile" and an automobile which is furnished or available for the regular use of the named insured. The exclusion states:

> "Non-owned automobile" means an automobile which is neither owned by nor furnished nor available for the regular use of either the named insured or any relative, other than a temporary substitute automobile. . .

The policy exclusion itself, then establishes a "frequency" standard. That is, a "temporary" versus "regular" standard is invoked to determine whether a vehicle is a non-owned vehicle. If temporary, the vehicle is a non-owned vehicle. If not temporary, the vehicle is a "regular" (i.e., regularly used) vehicle.

The exclusion of the policy focuses on the vehicle rather than the driver. That is, if the automobile is a "temporary substitute vehicle" (whether actually used or not), it is covered by the non-owned definition in the policy. If the vehicle is furnished for or available for the regular use of the insured (whether actually used or not) it is not a non-owned automobile as defined in the policy. Here, the truck was used

daily, was stored at Mr. Finlayson's house in the evening (even though other company trucks were stored at the company lot), Mr. Finlayson had keys to the truck and Mr. Finlayson was the primary operator of the truck. The focus of this court's inquiry should not be on how the truck was actually used, but the availability of the truck for use by Mr. Finlayson.

POINT V: THE COURT FAILED TO CONSIDER THE POLICY BEHIND THE "DRIVE OTHER CARS" PROVISION.

As pointed out in its brief, the purpose of the provision extending coverage to certain non-owned vehicles, is to provide coverage to an insured while temporarily operating a non-owned vehicle as a temporary substitute automobile.

In cases involving company vehicles, this policy encourages employers who allow employees to use company vehicles to maintain adequate insurance on the company vehicles as a benefit to the employee and as a protection to the public. In this case, insurance was maintained by FINCO on the pickup truck being used by Mr. Finlayson. The automobile policy on the company truck has already paid almost two hundred thousand dollars in claims arising from this accident.

However, if an employee uses a truck on a regular basis as more than a temporary substitute vehicle and is concerned about the limits of insurance being maintained by his company, or is concerned that his company may disclaim any responsibility for

his acts, he may obtain his own coverage by simply listing the truck on his policy and paying a premium for such coverage. Here, Mr. Finlayson only listed the Chevrolet Monte Carlo on the insurance policy with Metropolitan. He did not ask for, nor did he pay a premium for, insurance on the pickup truck. Yet, this truck was used by Mr. Finlayson as the primary operator. Since he used it every day in his work, used it to go to and from work, used it some evenings, and used it on some occasions for personal errands, he used the truck more than any other vehicle he operated. The truck was actually used, and available for, use beyond a temporary substitute vehicle.

Sound public policy supports a finding that only the FINCO business automobile policy would apply to the accident.

POINT VI: THE COURT FAILED TO CONSIDER THE BUSINESS USE EXCLUSION.

As mentioned in Metropolitan's brief, the policy of insurance excluded coverage to:

> . . . a non-owned automobile while maintained or used by any person while such person is employed or otherwise engaged in any other business or occupation. . .

Neal's employer considered his use of the truck to take him to his job and back home from the job to be part of the authorized business use. (See Stipulated Facts, #19). At the time of the accident, Neal Finlayson was on his way home. (Stipulated Facts, #26). The 1978 Chevrolet pickup truck was

stored at Neal Finlayson's home in the evenings, although other company trucks were stored at the company lot when not in use. (Stipulated Facts, #17).

## CONCLUSION

For the foregoing reasons, and each of them, it is respectfully submitted that this Court of Appeals should grant Petitioner's Motion for Rehearing in order to fully consider the facts, issues and law applicable to this case.

DATED this 21st day of March, 1988.

**HANSON, EPPERSON & SMITH**

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be mailed, postage prepaid, on this 22 day of March, 1988, a true and correct copy of the foregoing to the following:

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